(2)

No. 01-1358

Supreme Court U.S.
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In The

Supreme Court of the United States

VERONICA A. WALLACE,

Petitioner,

v.

THE METHODIST HOSPITAL SYSTEM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent The Methodist Hospital System disagrees with Petitioner's questions for review. The appropriate question is:

1. When the appellate decision below expressly relies upon *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and when the Fifth Circuit Court has consistently acknowledged and followed *Reeves*, should this Court address a decision of a court of appeals based on general assertions that such decision does not comport with *Reeves*?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The Petitioner is correctly identified in the caption. Petitioner's counsel are Beatrice Mladenka-Fowler, as counsel of record, and Shannon Breaux Sauceda of Mladenka-Fowler & Associates.

Respondent is correctly identified in the caption. The Methodist Hospital System, currently known as The Methodist Healthcare System, is a private, not-for-profit organization comprised of two holding companies, The Methodist Hospital Foundation and TMH Health Care Group. Respondent's counsel are Juliann H. Panagos, as counsel of record, Michael H. Rubin and M. Lucille Anderson of McGlinchey Stafford, PLLC.

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STATEMENT OF THE CASE

Respondent does not agree with the accuracy of the Petitioner's statement of facts. The following undisputed facts are relevant to the lower courts' determination that Respondent was entitled to judgment as a matter of law.[1]

A. Statement of Facts

Petitioner Veronica Wallace ("Wallace") was employed by the not-for-profit Methodist Hospital ("Methodist"), part of Respondent The Methodist Hospital System.[2] Wallace worked in the Medical Intensive Care Unit (MICU) where doctors and nurses care for the most critically ill patients in the hospital.[3] Every patient in the MICU suffers from multi-system organ failure.[4] Methodist's policies governing nursing and employee actions are designed to avoid life threatening activities and ensure outstanding care.[5] Compliance with written policy is imperative.[6]

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[1] Citations to the record on appeal are referred to as "R." and citations to the trial transcript are referred to as "Tr." The trial transcript does not reflect record page numbers, but instead is included in R. 122-26.

[2] Methodist provides integrated health care, educational and research opportunities. Tr. 192, 233 (Wallace); Tr. 1043 (Hahus).

[3] Tr. 187 (Wallace). The Doctors who practice at Methodist are not employed by Methodist, but by Baylor College of Medicine. Tr. 52.

[4] Tr. 187 (Wallace).

[5] Tr. 760 (Dr. Lloyd).

[6] Tr. 760 (Dr. Lloyd).

Wallace, who had previously worked as a student nurse at Methodist, was hired in September 1992 at a time when she was known to be five months pregnant.[7] The person who hired her at that time and who supervised her through the time of dismissal was Donna Hahus ("Hahus").[8]

Wallace took three-and-a-half months of maternity leave for the birth of her first child in 1993, with full pay and benefits.[9] After the birth of Wallace's child, Hahus complied with Wallace's request for primarily weekend hours, facilitating Wallace's child care responsibilities.[10] During her second maternity leave in the spring of 1994, Wallace took thirteen and a half weeks of paid leave from March 2, 1994 through June 4, 1994.[11] As a courtesy, Hahus allowed Wallace to enter her March 1994 time off as an "excused absence," so that Wallace could receive four additional weeks of paid vacation.[12]

In June 1994, in mandated compliance with the federal Clean Air Act,[13] Methodist offered a compressed

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[7] Tr. 204-05, 215 (Wallace); Tr. 542-43 (Hahus); PX 2 (offer and acceptance).

[8] Tr. 204-05, 215 (Wallace); Tr. 542-43, 1066 (Hahus); PX 2 (offer and acceptance); DX 22 (termination notice).

[9] R. 1168; Tr. 219 (Wallace); Tr. 1049-50 (Hahus); DX 15 (1993 time chart).

[10] Tr. 626-29 (Hahus).

[11] Tr. 1049 (Hahus); DX 17 (1994 time chart).

[12] R. 1166; Tr. 1050 (Hahus); DX 17 (1994 time chart).

[13] Tr. 39-41. The federal Clean Air Act mandated that certain employers take affirmative steps to reduce air pollution. Compressed time was a policy designed to ensure Methodist's

time schedule to nurses in the MICU.[14] Under such program, the nurses worked longer shifts, but fewer hours per week, continued to receive full benefits and enjoyed reduced commuting time.[15] Wallace elected and was awarded one of the six compressed positions, along with other pregnant and nonpregnant nurses.[16] In addition, Hahus and Schmitz continued to give preference to Wallace's shift selections, allowing her to work only on weekends to avoid having to secure child care.[17]

One of the MICU patients, Mr. B., suffered from cardiac and renal failure, diabetes and aspirational pneumonia from November 1994 through his death in January 1995.[18] Mr. B. had a Salem sump in place, a *large bore* nasogastric tube threaded through Mr. B's nose and into his stomach. The purpose of the Salem sump was both to decompress and aspirate Mr. B.'s stomach and deliver medication and nutrition.[19] On December 19, 1994, gastroenterologist Dr. Barroso ordered that Mr. B. "[s]tart TF

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compliance with the federal Clean Air Act and reflected an effort to reduce employee commuting time and thus, air pollution. Tr. 626 (Hahus).

[14] Tr. 39-41 (Clean Air Act); Tr. 247 (Wallace); Tr. 503 (Reggie Wallace); Tr. 626-27, 631 (Hahus).

[15] Tr. 39-41 (discussion of Clean Air Act); Tr. 247 (Wallace); Tr. 503 (Reggie Wallace); Tr. 626-27, 631 (Hahus).

[16] Tr. 228-29 (Wallace); Tr. 626-27, 631 (Hahus); Tr. 247 (Wallace); Tr. 503 (Reggie Wallace).

[17] Tr. 496-97 (Reggie Wallace); Tr. 1022 (Schmitz); Tr. 1057 (Hahus); DX 36 at p. 3.

[18] Tr. 718, 788 (Dr. Lloyd); Tr. 849 (Dr. Barroso).

[19] Tr. 721-22 (Dr. Lloyd); Tr. 849-50 (Dr. Barroso).

[tube feeding] . . . "[20] Later that day, attending physician Dr. Lloyd noticed Mr. B.'s Salem sump had been removed and replaced with a *small bore* feeding tube that could not be used for necessary decompression or aspiration.[21] Dr. Lloyd found an order "Place feeding tube & check with X-ray," signed "Dr. Hanania" by "Veronica Wallace."[22]

When questioned by Dr. Lloyd, Dr. Hanania denied giving any order to change Mr. B.'s nasogastric tube.[23] Dr. Lloyd confronted Wallace and expressed his concern that she had practiced medicine without a license, endangered the patient, and falsified a medical record.[24] Not only

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[20] Tr. 226-27 (Dr. Lloyd); DX 1 (doctor's order).

[21] Tr. 722-24 (Dr. Lloyd); DX 1 (doctor's order); Tr. 1082 (Hansen).

[22] Tr. 722-24 (Dr. Lloyd); DX 1 (doctor's order); Tr. 1082 (Hansen). Contrary to Wallace's argument that she did not "willfully falsify" a patient's record, she attributed approval for the procedure to a specific doctor whose name she wrote next to the order and thereby confirmed her knowledge that a doctor's order was required for placement of the tube. In addition, Wallace attributed the order to a physician other than Mr. B's physician. Not only was Wallace's conduct willful, it was deceitful.

[23] Tr. 725, 746 (Dr. Lloyd); Tr. 807 (Dr. Hanania).

[24] Tr. 747, 749-52 (Dr. Lloyd). In her Petition, Wallace states she "was following the policy and procedure practiced in Methodist MICU and she truthfully recorded the actions she had taken in the patients records," Petition p. 16. In fact, Wallace committed two "Class I" violations under Policy P-001, did not obtain the required doctor's order for insertion or removal of a nasogastric tube under Policy D-707 and falsely wrote in the patient's record that she had received the required order from Dr. Hanania when she did not seek or receive that order. Tr. 807 (Dr. Hanania); Tr. 1068 (Hahus).

does Methodist have a written policy requiring a physician's order for insertion or removal of a nasogastric tube,[25] Wallace admitted "I shouldn't have placed the feeding tube or written the verbal order without speaking to the physician first."[26] All the other nurses agreed they would never remove a Salem sump or insert a feeding tube without first consulting a physician.[27]

Dr. Lloyd complained of Wallace's actions to supervising nurse Tory Schmitz ("Schmitz"), who investigated immediately and recorded the results of her investigation, including Wallace's admissions.[28] Hahus then independently confirmed the facts gathered by Schmitz and consulted with her supervisor and the nursing director Paula Hansen, the medical director Dr. Davies, Dr. Hananía and finally, chairman of the Peer Review Committee Marcella Louis.[29] Hahus also reviewed the Texas Nurse Practices Act and Hansen consulted with Leslie Wagner in Human Resources.[30] Based on the investigation and because Wallace admitted her conduct, it was undisputed Wallace (1) wrote a false entry into the medical record reflecting a doctor's order had been given for a medical

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[25] DX 4 at Policy D-707.

[26] Tr. 381, 448-51 (Wallace); Tr. 1018-21 (Schmitz); DX 8A (notes) at p. 9; DX 30.

[27] Tr. 603-04 (Goggins); Tr. 675-76, 687-79, 681-82 (Gaskin); Tr. 602-03 (Hooper); Tr. 971-72, 975 (Coscio); R. 117 (Rousseau-Mezile); Tr. 752 (Dr. Lloyd); Tr. 1017 (Schmitz).

[28] Tr. 880, 1018-21 (Schmitz); DX 8A (notes); Tr. 1017-20 (Schmitz).

[29] Tr. 1061-65 (Hahus); Tr. 1076-78 (Hansen).

[30] Tr. 1063 (Hahus); Tr. 1078 (Hansen).

procedure and (2) without having obtained any such order, proceeded to perform a medical procedure of a type that requires doctor approval in advance.[31] Both actions are in violation of Methodist policies. On only one other occasion had a nurse falsified a medical record and that nurse was immediately discharged.[32]

Paula Hansen and Leslie Wagner approved of termination based on Wallace's December 19, 1994 conduct, not knowing Wallace, her name or that she was pregnant at the time of their decision.[33] Likewise, Dr. Davies and Marcella Louis approved of termination.[34] Hahus terminated Wallace on December 21, 1994.[35] Termination was based on two separate "Class I" violations: unprofessional conduct detrimental to patient care and deliberate omission or falsification of employee/employer records.[36] After conducting a grievance meeting, the Methodist review committee subsequently upheld the termination under Policies D-707[37] and

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[31] Policy D-707 provides "A physician's order is required for insertion or removal of a nasogastric tube."

[32] Tr. 607-08 (Hahus).

[33] Tr. 1064 (Hahus); Tr. 1076, 1079 (Hansen). Hansen and Wagner both had the authority to overrule Hahus's decision to terminate Wallace. Tr. 1078-79 (Hansen).

[34] Tr. 1062 (Hahus).

[35] DX 22 (termination notice); Tr. 1066 (Hahus).

[36] DX 22 (termination notice); DX 4 at Policy P-001 and Appendix (G) and (H); Tr. 1068 (Hahus).

[37] DX 4 at Policy D-707.

P-001[38] because Wallace admitted to falsifying the record and was unable to present any justification when given the opportunity to do so.[39] After the termination, dietician Shawn Forney inquired as to which nurse had been fired, but did not recognize the name of the nurse that

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[38] The Due Process Policy P-001 provides:

> A Class I Violation is defined as a serious violation of System standards under circumstances that, after a thorough consideration of the facts, may justify termination for a first violation without regard to the employee's length of service or prior record of conduct. Recommended action to be taken is termination for the first violation after review by Employee Relations. *See* III. H. 2.

DX 4; Tr. 1068 (Hahus). Section III(H)(2) of Policy P-001 states:

> Immediate termination. If termination is elected due to the clarity of the issues involved and the severity of the violation, the manager/supervisor must review the facts with Employee Relations before terminating the employee and no later than a workday following a weekend termination to ensure that the action was equitable and consistent with other similar cases.

DX 4. In its Appendix, Policy P-001 lists a number of Class I Violations including:

> G. Willful or illegal, unprofessional conduct or unethical conduct detrimental to patient care or to TMHS's operations that result in neglect, abuse, or exploitation of any patient.
>
> H. Deliberate omission of information, falsification of employee/employer records, or falsifying information to management regarding their availability for work, job duties, or performance.

DX 4.

[39] Tr. 1081 (Hansen); DX 8A (notes); Tr. 1017-20 (Schmitz).

had been fired.[40] Schmitz described Wallace as the one who has been pregnant.[41]

Wallace states in her Petition that "[t]he Nursing Board of Examiners took no action against Ms. Wallace in response to Ms. Hahus' report of the incident and termination."[42] All evidence concerning the Nursing Board of Examiners was inadmissible at trial as Wallace failed to produce the letter she submitted to the Board in response to its charges against her.[43] Wallace makes other allegations in her "statement of facts" that are not supported by the record and which, in fact, either were not evidence at trial or were excluded from consideration by the trial court's rulings on motions *in limine*.[44]

Of the thirty-two nurses working in MICU, it is undisputed that ninety percent are female and three to seven of the MICU nurses give birth each year.[45] It is also unchallenged that these pregnant MICU nurses take maternity leave and return to work without any adverse career consequences.[46] One quarter of the three thousand babies born at Methodist each year are born to Methodist

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[40] Tr. 928-31.

[41] Tr. 671 (Gaskin); Tr. 931-34 (Forney); Tr. 1005-07 (Schmitz). Gaskin testified she did not hear the conversation, only the "she's been pregnant" statement and thus, the conversation is uncontroverted. Tr. 687 (Gaskin).

[42] Petition p. 4.

[43] Tr. 97.

[44] *See, e.g.*, Tr. 97-112, 246-47, 747, 749-52, 807, 1068.

[45] R. 1157; Tr. 1000 (Schmidt); Tr. 1046-47 (Hahus).

[46] R. 1157; Tr. 1023 (Schmidt).

employees.[47] Six of the ten MICU nurses testifying at trial were or had been pregnant while employed at Methodist.[48] Two nurses, Wallace and Paula Hansen, were known to be pregnant when they were hired by Methodist.[49] At the time of trial, there were two pregnant nurses in MICU, including Amy Goggins who testified for Wallace.[50]

B. Proceedings Below

Wallace filed suit against Methodist in federal district court on January 14, 1997.[51] During the first trial, the jury did not reach a verdict and a mistrial was declared.[52] The second trial resulted in a verdict in favor of Wallace.[53] Following the jury's verdict, Methodist moved for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. After receiving considerable briefing and argument and reviewing the entire trial transcript, the district court granted Methodist's motion for

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[47] Tr. 1075 (Hansen). Of the pregnant nurses in MICU each year, there is an additional number of pregnant MICU nurses who give birth elsewhere or do not carry to term. Tr. 1046-47 (Hahus).

[48] Tr. 205 (Wallace) (two births); Tr. 594 (Goggins) (two births); Tr. 680-81 (Gaskin) (two births); R. 117 (Rousseau-Mezile) (one birth); Tr. 999 (Schmitz) (two births); Tr. 1075 (Hansen) (two births).

[49] Tr. 205 (Wallace); Tr. 1076 (Hansen).

[50] Tr. 1023 (Schmitz).

[51] R. 1-8; R. 1170.

[52] R. 620.

[53] R. 849.

judgment as a matter of law and, by final judgment dated February 24, 2000, dismissed the case with prejudice. *Wallace v. The Methodist Hospital System*, 85 F.Supp.2d 699 (S.D. Tex. 2000).[54]

On November 7, 2001, the United States Court of Appeals for the Fifth Circuit affirmed the dismissal. *Wallace v. The Methodist Hospital System*, 271 F.3d 212 (5th Cir. 2001).[55] On December 13, 2001, Petitioner's Petition for Rehearing *En Banc* was denied.[56]

SUMMARY OF THE ARGUMENT

The petition for writ of *certiorari* should be denied because the questions presented by the Petitioner do not meet any of the usual and customary requirements for granting a writ of *certiorari*. Wallace requests that this Court review the court of appeals' application of the holdings in *Reeves v. Sanderson Plumbing Products, Inc.* to the facts of her case.[57] Such request is inappropriate where Wallace admitted the behavior for which she was terminated and did not contest the legitimate business reasons for her discharge. The court of appeals was well within its discretion in its application of Federal Rule of Civil Procedure 50, with express deference to *Reeves*,

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[54] Petition for writ of *certiorari*, Appendix C. The Appendix attached to the petition is referred to as "App."

[55] App. A.

[56] App. B.

[57] 530 U.S. 133 (2000).

basing its assessment on the abundance of uncontroverted and unimpeached evidence in the record.

Wallace seeks an advisory opinion on the "nearly identical" analysis used by the lower courts to evaluate work-rule violations. In addition, Wallace seeks an advisory opinion on the Fifth Circuit Court's application of *Reeves* and its post-*Reeves* jurisprudence in evaluating certain remarks in the workplace. Considering the clarity of the factual issues, this case is not the appropriate forum to evaluate further either method of judicial analysis.

ARGUMENT

I. The Facts of the Case Militate Against the Granting of the Writ.

A. This Case Does Not Meet Any of the Usual and Customary Criteria for Granting a Writ of *Certiorari*.

United States Supreme Court Rule 10 provides that the granting of a petition for a writ of *certiorari* is a matter of judicial discretion and will be exercised only for compelling reasons. Compelling reasons under Rule 10 include: (1) a conflict between two United States courts of appeals; (2) a conflict between two state courts of last resort or between one such court and a United States court of appeals; or (3) a state court or a United States court of appeals has decided an important question of federal law that has not been, "but should be, settled by

this Court."[58] None of these reasons are present or asserted in this case. When the asserted error consists of purported erroneous factual findings or an alleged misapplication of a properly stated rule of law, Rule 10 provides a petition for writ of *certiorari* is rarely granted.

Wallace does not identify any ruling from another circuit court that conflicts with the Fifth Circuit Court's ruling, nor any conflict between two state courts of last resort or between one such court and a court of appeals. Wallace does not even contend that the case below involves an important question of law that has not been, but should be decided by this Court. Rather than meeting any of the usual and customary writ criteria, Wallace's application focuses on what she contends to be erroneous factual findings and misapplication of properly stated rules of law, neither of which are a favored reason for granting a writ of *certiorari*.

Although throughout its opinion the Fifth Circuit Court expressly relied on this Court's ruling in *Reeves*, Wallace accuses the court of appeals of ignoring *Reeves* on eleven separate occasions in her Petition.[59] The Fifth Circuit has not ignored *Reeves*, as is clear not only by its express reliance on *Reeves* in five separate places in the *Wallace* opinion,[60] but also by its detailed analysis of *Reeves* in *Vadie v. Mississippi State University* and *Russell v.*

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[58] *See, e.g.*, SUP. CT. R. 10.

[59] Petition pp. 5, 6, 8, 9, 12, 16, 19, 21.

[60] *Wallace*, 271 F.3d at 219-20, 222, 224.

McKinney Hospital Venture.[61] The Fifth Circuit Court has consistently rejected district court judgments that have not comported with *Reeves*.[62]

Wallace does not present any new issue of great importance. At best, the only matter at issue is whether the lower court should have applied an interpretation of the law preferred by Wallace, an issue that need not be reviewed by this Court. Wallace attempts to paint her litany of factual complaints as confirmation that the lower courts were "ignoring the teachings of *Reeves*" and acting in "direct contradiction of this Court's instruction in *Reeves*." There is no such disparity between *Reeves* and *Wallace*.

B. Wallace Seeks Review of Factual Findings After Conceding Legitimate Business Reasons for Her Termination and Admitting Violations of Hospital Policy.

The facts in this case are largely uncontradicted and unimpeached and as such, militate against the granting of

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[61] 215 F.3d 365, 373, n.23 (5th Cir. 2000); 235 F.3d 213, 223 n.4 (5th Cir. 2000) ("[W]e simply comply with the Supreme Court's mandate in *Reeves* not to substitute our judgment for that of the jury and not to unduly restrict a plaintiff's circumstantial case of discrimination. We therefore underscore that *Reeves* is the authoritative statement regarding the standard for judgment as a matter of law in discrimination cases. *Reeves* guides our decisions, and insofar as *Rhodes [v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996)] is inconsistent with *Reeves*, we follow *Reeves*.).

[62] *See, e.g., Blow v. City of San Antonio, Tex.*, 236 F.3d 293, 297 (5th Cir. 2001), *reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001); *Evans v. City of Bishop*, 238 F.3d 586, 591 (5th Cir. 2000); *Ratliff v. City of Gainesville, Tex.*, 256 F.3d 355, 362 (5th Cir. 2001).

the writ. The events leading to Wallace's termination took place in an intensive care unit of a hospital recognized for world class medical care.[63]

On December 19, 1994, Wallace committed not one, but two egregious acts, either sufficient to justify immediate termination under written policy.[64] Methodist's written policies require strict enforcement when dealing with the most critically ill patients in the hospital.[65] Wallace admits to performing both instances of conduct that formed the basis of her termination, but asserts in her Petition, "it does not matter whether [she] admitted [the conduct]," instead explaining her conduct was not "willful."[66] Wallace also admits her conduct was wrong. In her June 14, 1995 statement to the EEOC signed "under penalty of perjury," Wallace states "I shouldn't have placed the feeding tube or written the verbal order without speaking to the physician first."[67] The consequence of committing any act constituting a Class I Violation under hospital Policy P-001 is termination.[68]

It is undisputed that Wallace (1) made a medical decision in violation of state law,[69] (2) performed a

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[63] Tr. 192, 233 (Wallace); Tr. 1043 (Hahus).

[64] DX 8A (notes); Tr. 1017-20 (Schmitz).

[65] Tr. 760 (Dr. Lloyd).

[66] Tr. 381, 448-51 (Wallace); Tr. 1018-21 (Schmitz); DX 8A (notes) at p. 9 (Notes); DX 30 (EEOC charge); Petition p. 16.

[67] DX 30 (EEOC charge); Tr. 456.

[68] DX 4 at Policy P-001 and Appendix (G) and (H); Tr. 1068 (Hahus).

[69] Tex. Occ. Code § 301, *et seq.* The record confirms that the applicable statute – the Nurse Practices Act – is a law to guide

technical and potentially dangerous medical procedure on a comatose patient, (3) where written policy requires a prior doctor's order, and (4) lied about her behavior by making a false entry into a medical record. There is no clearer case for termination, and either ground – falsification of a medical record or practicing medicine without a license – is sufficient to support Methodist's decision. The decision to terminate was approved on review of the facts by a number of hospital administrators who did not know Wallace was pregnant[70] and assessed again after termination under Policy P-009 in a grievance meeting attended by Wallace.[71]

Based on the clarity of the issues and the severity of the violations, Methodist properly terminated Wallace for reasons that were both legitimate and in the protection of its patients who were in the critical care unit. Failing to terminate under these facts would render Methodist policies meaningless.

Wallace does not challenge either of Methodist's legitimate business reasons for her termination as false. Instead, Wallace contends those reasons are a pretext for discrimination by claiming an inference of discrimination based on alleged disparate treatment and stray remarks which both the trial and appellate courts found did not relate to her protected class, were not proximate in time, and were not made by one with decision making authority.

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the practice of registered nurses and provides that a nurse cannot "diagnose, prescribe or dispense." Tr. 1052-53 (Hahus); Tex. Occ. Code § 301.452.

[70] Tr. 1061-65 (Hahus); Tr. 1076-78 (Hansen).

[71] Tr. 290 (Wallace); Tr. 1076, 1079-80 (Hansen).

C. The Decision Below Is Consistent with *Reeves*.

This Court's opinion in *Reeves* confirms that the falsity of the employer's explanation is critical to a "pretext" analysis when the employer's purported reasons are at odds with the facts. Unlike the employee in *Reeves*, however, Wallace did not begin to make a "substantial showing that the [employer's] explanation was false," for Wallace admitted her wrongful conduct and does not contest that such conduct is sufficient for termination under Policy P-001.[72] This is in sharp contrast to the employee in *Reeves* who created a fact issue on the employer's reason for termination (time keeping errors), and the employer in *Reeves* who admitted inconsistencies in the "legitimate business reason" concerning time clocks malfunctioning.[73] Based on Wallace's own admissions and the wording of Policy P-001, Methodist's legitimate business reasons for termination were true, not false. Wallace simply failed to meet her burden of proof under *Reeves* to show both a *prima facie* case and "sufficient evidence" that her employer's legitimate business reasons are false.[74]

Wallace relied on no direct evidence of discrimination, but instead alluded to a lack of credibility of the defendant's witnesses and presented alleged indirect evidence of discrimination in the form of other instances of conduct and remarks unrelated to her record falsification. Wallace does not identify any other nurse who falsified a

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[72] *Reeves*, 530 U.S. at 144-45.

[73] *Reeves*, 530 U.S. at 145.

[74] *Reeves*, 530 U.S. at 148.

record and was not terminated. Rather, the evidence shows that the one other nurse who falsified a medical record also was terminated.[75] The attached chart presents uncontroverted evidence as to why each of Wallace's specific examples of treatment of other nurses was not similar or equivalent to Wallace's conduct in this case. *See* attached chart. There is simply no evidence that a primary reason for termination – Wallace's falsification of the medical record – was untrue and thus, a pretext. This reason alone is sufficient to support her termination under *Reeves* as Wallace does not present "sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its decision."[76]

In *Reeves*, this Court instructs courts to give credence to uncontradicted and unimpeached evidence regarding the validity of an employer's legitimate business reason, "at least to the extent that the evidence comes from disinterested witnesses," like Dr. Lloyd.[77] Further, *Reeves* noted that even if the plaintiff can show a *prima facie* case and evidence tending to show pretext (which Wallace did not), a jury's finding of liability must be rejected when "no rational factfinder could conclude that the action was

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[75] Tr. 607-08 (Hahus). *See Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998) ("Without a showing that [the employer] adhered to the requirements of the [ ] policy only in cases involving its pregnant workers, [plaintiff] cannot maintain that she was a victim of discrimination under the PDA [Pregnancy Discrimination Act].").

[76] *Reeves*, 530 U.S. at 146.

[77] *Reeves*, 530 U.S. at 151 (citation omitted); Tr. 747, 749-52 (Dr. Lloyd).

discriminatory . . . " such as when "the record conclusively revealed some other, non-discriminatory reason for the employer's decision."[78]

No rational factfinder could conclude that Wallace's termination was improper in the face of uncontradicted and unimpeached evidence in this case. No nurse – pregnant or not – is allowed to (1) make a medical decision, (2) act on that decision by performing a medical procedure without a doctor's knowledge or consent, (3) ignore policies that prohibit such behavior and (4) lie by making false entries into a medical record.

II. It Is Well-Settled That Appellate Courts May Determine Legal Sufficiency of the Evidence Pursuant to Rule 50 of the Federal Rules of Civil Procedure.

It is fundamental that courts may determine the legal sufficiency of the evidence.[79] Wallace contends the court of appeals made improper weight and credibility determinations prohibited by *Reeves*.[80] Wallace neglects to acknowledge, however, this Court's observation in *Reeves* that a court is not only permitted, but should render judgment as a matter of law when a "party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party

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[78] *Reeves*, 530 U.S. at 148 citing *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1291-92 (D.C. Cir. 1998) (*en banc*); *Fisher v. Vassar College*, 114 F.3d 1332, 1388 (2nd Cir. 1999) (*en banc*), *cert. denied*, 522 U.S. 1075 (1998).

[79] FED. R. CIV. P. 50.

[80] Petition p. 7, 12.

on that issue."[81] Indeed, in the words of *Reeves*, "[t]o hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50," something this Court has consistently declined to do.[82]

Reeves does not eliminate a Rule 50 motion as Wallace would have this Court believe, but rather reaffirms its primacy.

III. The Fifth Circuit Court Did Not Improperly Comment on the Weight of the Evidence.

Wallace's arguments about the "weight" of the evidence are inapplicable when evidence is undisputed. It is undisputed that Wallace engaged in the acts for which Methodist terminated her. Wallace admitted "I shouldn't have placed the feeding tube or written the verbal order without speaking to the physician first."[83] Policy P-001 expressly classifies either of these acts as "Class I Violations" rendering the employee subject to immediate termination. Such evidence supports Methodist, is uncontradicted and unimpeached.[84] The jury was

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[81] 530 U.S. 133, 149 (2000); FED. R. CIV. P. 50(a); *see also Weisgram v. Marley Co.*, 528 U.S. 440, 447-48 (2000).

[82] 530 U.S. at 148, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993).

[83] Tr. 381, 448-51 (Wallace); Tr. 1018-21 (Schmitz); DX 8A (notes) at p. 9; DX 30.

[84] *Reeves*, 530 U.S. at 151.

required to believe such uncontradicted evidence, as was the Fifth Circuit Court.[85]

While Wallace acknowledged she should not have removed the Salem Sump and replaced it with a feeding tube, she claims her conduct was minimized by the ambiguous testimony of Cheryl Gray.[86] Unlike Cheryl Gray, Wallace never spoke to a physician and admitted she should not have written the verbal order in the medical record without speaking to the physician first. No other nurse falsified a medical record without being terminated and Methodist terminated the only other nurse who made a false entry into a medical records.[87]

Thus, the critical elements of the case favoring Methodist are undisputed and uncontradicted. The Fifth Circuit Court had no need to weigh the evidence and could not have improperly commented on the weight of undisputed evidence, as Wallace claims. Wallace produced no evidence to deny her conduct, dispute Methodist policies or contest her termination under those policies. Nor did she present any instance of another nurse who falsified a record and was not discharged. The lower courts did not assess the "credibility" of evidence; rather, the courts acknowledged the absence of evidence supporting Wallace's claims.

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[85] *Id.*

[86] Cheryl Gray testified when she was confronted by a doctor about her placement of the tube, she "told him that the doctor . . . had given me the order and [that is] why the tube was placed." Tr. 524-25 (Gray).

[87] Tr. 607-08 (Hahus).

IV. Wallace Seeks an Advisory Opinion from this Court on Established Fifth Circuit Jurisprudence.

In her first and third questions presented, Wallace seeks an advisory opinion from this Court on the issues of "nearly identical" conduct and the "stray remarks" analysis. Neither request is an appropriate basis for granting a writ of *certiorari* in this case.

A. The Proper Analysis for Alleged "Work-Rule Violations" Is "Nearly Identical" Conduct That Did Not Result in Termination.

In her third question presented, Wallace sets up a straw-man argument that the lower courts required Wallace to "present identical, comparative evidence in order to rebut the defendant's justification for the adverse action."[88] Wallace then contends that such requirement is contrary to this Court's holding in *Reeves*.[89] Neither *Wallace* nor *Reeves* uses the standard "identical" or "comparative" and, contrary to Wallace's assertion, the court of appeals did not impose any heightened evidentiary requirement on Wallace. The court of appeals simply applied its long-standing "nearly identical" analysis to the litany of dissimilar instances of conduct presented by Wallace in her attempt to show pretext. Likewise, the

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[88] Petition p. ii.

[89] Petition pp. 15-16. Wallace apparently derives this fictional "requirement" from the Fifth Circuit's description of Cheryl Gray's insertion of a nasogastric tube as "almost the exact procedure." Wallace attempts to elevate such factual description to a legal standard followed in the Fifth Circuit.

phrase "nearly identical" is expressly mentioned in the *Reeves* decision in the context of comparing employee conduct.[90] Therefore, Wallace's argument is without merit and does not warrant granting the writ on this issue.

Nevertheless, Wallace contends the court of appeals improperly applied its own legal precedent and required her to present evidence of "identical acts," rather than merely "similar acts," performed by other, non-pregnant nurses who were not discharged. The court of appeals, however, properly obligated Wallace to show instances of other conduct that were "nearly identical" in order to demonstrate disparate treatment as evidence of intentional discrimination.[91] Wallace's recitation of the other instances of conduct on pages 13 through 15 of her Petition is misleading and incorrectly characterizes actual witness testimony. *See* attached chart. For example, Wallace's claim that Hahus "was aware that nurses wrote verbal orders and implemented procedures such as x-rays, flushes, restraints, and altering dosages of medications, all of which require a doctor's order" is wrong because by written policy, none of these procedures require a doctor's order.[92] *See* attached chart. Finally,

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[90] *Reeves*, 530 U.S. at 151.

[91] *Wallace* 271 F.3d 212 (5th Cir. 2001), citing *Smith v. Wal-Mart Stores (No. 471)*, 891 F.2d 1177, 1180 (5th Cir. 1990) (*per curiam*); *see also Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995) and *Little v. Republic Refining Co.*, 924 F.2d 93, 97 (5th Cir. 1991).

[92] Tr. 648-49 (x-rays) and Policy D-711; Tr. 647-48 (flushes) and Policy D-1406 (Insertion, Management, and Removal of Central Venous Catheters); Tr. 430-33, 645 (restraints) and Policy D-505 (Use of Restraints); Tr. 427-28, 642-44 (altering dosages)

while Wallace asserts (without reference to the record) that "Hahus allowed and encouraged her nurses to break this rule [to obtain a doctor's order for procedures that require an order] on a routine basis," there is no evidentiary basis whatsoever for this illogical statement.

It is well-settled in the Fifth Circuit that to defeat judgment as a matter of law in an employment discrimination case where a "work-rule violation" is at issue, a plaintiff must show "the misconduct for which she was discharged was nearly identical to that engaged in by a [non-pregnant] employee whom [the company] retained."[93] Notably, Wallace avoids any discussion of decisions from any court of appeals or other circuits or state courts of last resort on this issue in support of her argument before this Court. Wallace's third question presented implies the analysis of "identical comparative evidence" is somehow precluded by *Reeves*, but because that issue is not discussed in the *Reeves* opinion, Wallace is requesting this Court to evaluate what she contends is the Fifth Circuit Court's misapplication of a properly stated rule of law.

The Fifth Circuit Court consistently compares the work-rule violation at issue with nearly identical violations to determine whether a similarly situated employee, outside the plaintiff's protected class, was treated

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and Policy D-201 (Steps Common to the Administration of Medication). All policies are contained in DX 4.

[93] *Smith*, 891 F.2d at 1180 (citation omitted).

differently.[94] There is no contrary precedent established by the law of this Court. In the Fifth Circuit, courts require that any comparative evidence be nearly identical to the plaintiff's individual circumstance before other instances of conduct can be regarded as proper evidence of discrimination or pretext.[95] Wallace's contention that the lower courts erred by insisting on instances of "identical acts" is without merit. Instead, the lower courts correctly found Wallace's unrelated and distinguishable instances of conduct were not evidence of pretext or discrimination. *See* attached chart.

B. The Court of Appeals Properly Assessed Remarks Presented by Wallace as Stray under the Express Parameters of *Reeves*.

Wallace claims in her first question presented that use of the stray remarks analysis followed by the Fifth Circuit Court is prohibited by the *Reeves* decision and has

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[94] *Okoye v. The University of Texas Houston Health Science Center*, 245 F.3d 507, 514 (5th Cir. 2001) (plaintiff physician's situation was not nearly identical to that of other physicians with performance issues that were not terminated because unlike the others, plaintiff allegedly assaulted a co-worker); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995) (African-American machine operator suspended for work-rule violation did not offer evidence sufficient to support a finding that white employees in "nearly identical" circumstances were treated differently); *Smith*, 891 F.2d at 1180 (female employee's conduct involving a breach of the non-fraternization policy was not nearly identical to that of a male employee who was treated differently), citing *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570 (5th Cir. Unit B 1982).

[95] *See* n.94, *supra*.

no place after a jury verdict. Contrary to Wallace's assertion that the application of the stray remarks analysis is somehow prohibited by *Reeves*, a remarks analysis is actually contained in the *Reeves* opinion.[96]

Following *Reeves*, the Fifth Circuit heeded this Court's admonition and viewed its pre-*Reeves* jurisprudence cautiously.[97] The Fifth Circuit Court's decision in this case is consistent with *Reeves* and post-*Reeves* jurisprudence.

Prior to the *Reeves* decision, the Fifth Circuit Court warned "the 'stray remark' jurisprudence is itself inconsistent with the deference appellate courts traditionally allow juries regarding their view of the evidence presented and so should be narrowly cabined."[98] After *Reeves*, the Fifth Circuit Court analyzed the stray remarks analysis in *Wallace*, *Rubinstein*, *Russell* and *Auguster*.[99] In each instance, the Fifth Circuit Court adhered to this Court's *Reeves* analysis which, like the *Wallace* decision, requires that remarks be "in addition to" other evidence of pretext.[100] In *Reeves*, this Court expressly treats remarks as "additional evidence" when it states "[i]n this

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[96] *Reeves*, 530 U.S. at 151-53.

[97] *Russell*, 235 F.3d at 229.

[98] *Vance v. Union Planters Corp.*, 209 F.3d 438, 442 n.4 (5th Cir. 2000) cited in *Russell*, 235 F.3d at 229.

[99] *Wallace*, 271 F.3d at 222; *Auguster v. Vermilion Parish School Board*, 249 F.3d 400, 404 (5th Cir. 2001); *Russell*, 235 F.3d at 225-26; *Rubinstein v. Administrators of Tulane Educ. Fund*, 218 F.3d 392, 400-01 (5th Cir. 2000), *reh'g en banc denied*, 232 F.3d 212, *cert. denied*, 532 U.S. 937 (2001).

[100] *Reeves*, 530 U.S. at 151.

case, *in addition* to establishing a prima facie case of discrimination and creating a jury issue as to the falsity of the employer's explanation, petitioner introduced *additional evidence* that [the decision maker] was motivated by [discriminatory] animus and was principally responsible for petitioner's firing. Petitioner testified that [the decision maker] told him . . . [various age-related comments]."[101] By analogy, this Court observed in *Price Waterhouse v. Hopkins* that "remarks at work that are based on sex stereotypes do not inevitable prove that gender played a part in a particular employment decision. . . . In any event, the stereotyping in this case did not simply consist of stray remarks."[102] In other words, consideration of remarks occurs only after the plaintiff has demonstrated a *prima facie* case and some evidence of pretext. Without such demonstration, purported remarks, by themselves, cannot demonstrate discrimination.

Consistent with *Reeves*, the court of appeals observed "in light of Wallace's failure to rebut each of the reasons Methodist proffered, the comments must satisfy the test we laid out in [*Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996)]."[103] Wallace does not create an inference of discrimination based on remarks because all the comments she identifies are either not related to pregnancy, or were made by co-workers, or were made long before the December 21, 1998 termination. There is no reason to evaluate the Fifth Circuit Court's application of a legal analysis that is consistent with *Reeves* because both the

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[101] *Reeves*, 530 U.S. at 151 (emphasis added).

[102] 490 U.S. 228, 251 (1989) (emphasis in original).

[103] App. A, p. 13.

court of appeals and this Court acknowledge remarks meeting certain criteria may be used to bolster an employee's evidence of pretext.

In sum, in assessing Wallace's remarks as stray, the lower courts were well within their authority under Federal Rule of Civil Procedure 50, did not make credibility determinations or invade the province of the jury and were within the express parameters of *Reeves*. The lower courts properly refused to permit remarks that do not meet certain criteria, as outlined in *Reeves*, such as remarks being made by the decision maker and related to the protected class, to constitute sole evidence of pretext.[104]

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[104] *Reeves*, 530 U.S. 151-52.

CONCLUSION

The petition for writ of *certiorari* should be denied because (1) the facts of this case militate against the granting of the writ; and (2) Petitioner does not meet any of the usual and customary criteria for a writ of *certiorari*.

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CHART SUMMARIZING OTHER INSTANCES OF CONDUCT

Each of the following instances of conduct cited by Wallace, along with every other instance of conduct by a nurse in the record, is summarized below. In each instance, but for those two instances where a nurse was discharged, it is uncontested that no supervisor was aware of any violation.[105]

WALLACE'S EXAMPLES OF OTHER CONDUCT	RECORD EVIDENCE OF OTHER CONDUCT
DOCTOR'S ORDER REQUIRED AND RECEIVED	
Cheryl Gray inserted a nasogastric tube (which requires a doctor's order under D-707).[106]	Cheryl Gray testified that she placed the tube pursuant to a doctor's order.[107]
"[B]efore Ms. Wallace was terminated, [Pat] Gaskin replaced a feeding tube with another feeding tube without a doctor's direct order ... [and] she observed a fellow MICU nurse insert a feeding tube without a doctor's order."[108]	Gaskin testified she *never* replaced a feeding tube without a doctor's order nor could she testify if this "fellow nurse" received a doctor's order to replace a tube before Gaskin observed her replacing it.[109]
Wallace testified that in 1993, Linda Coscio inserted a Foley catheter (which requires a doctor's order under D-901).[110]	Coscio denies she ever inserted a Foley Catheter without a doctor's order and received the order before Wallace saw her insert the catheter. Wallace concedes she only saw Coscio insert the tube.[111]

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[105] Tr. 1091-93 (Wallace); Tr. 641, 642, 643, 644, 646, 1071 (Hahus); Tr. 970 9Coscio); Tr. 1082 (Hansen).

[106] DX 4 at Policy D-707 (Care and Management of Nasogastric Tubes).

[107] Gray testified that when she was confronted by a doctor about her placement of the tube, she "told him that the doctor . . . had given me the order and [that is] why the tube was placed." Tr. 524-25 (Gray).

[108] This "evidence" only appears in Wallace's post-trial briefing, but not in any trial testimony. The record citations noted by Wallace do not support this statement (Tr. 667, 668).

[109] Nurse Gaskin testified she *never* inserted a feeding tube without a doctor's order. Tr. 675-76, 687-79, 681-82 (Gaskin) ("Q. Before Ms. Wallace was fired, did you ever write an order to replace the Salem sump with the feeding tube without first having the doctor's order? A. No.").

[110] Tr. 292, 422-6 (Wallace); DX 4 at Policy D-901 (Catherization of Urinary Diversion).

[111] Tr. 425-26 (Wallace); Tr. 970 (Coscio); DX 4 at Policy D-902 (Insertion, Care and Removal of Urethal Catheters).

WALLACE'S EXAMPLES OF OTHER CONDUCT	RECORD EVIDENCE OF OTHER CONDUCT
DOCTOR'S ORDER NOT REQUIRED AND NOT RECEIVED	
Wallace inserted an I.V. line.[112]	Per policy D-1406, a doctor's order is not needed to insert an I.V. line.[113]
Nurse wrote an order "to the pharmacy" to concentrate medications in patient's fluids to comply with a standing order for fluid restrictions.[114]	The fluid restriction was per doctor's order per Policy D-201 and the concentration did not change the medication dosage. A doctor's order was not needed.[115]
Lynn Cameron took blood for lab work.[116]	Per policy D-613, a doctor's order is not needed to draw blood unless drawn from the leg or foot.[117]
Jennifer Hemming gave a "breathing treatment" in an emergency or "stat" situation.[118]	A doctor's order is not needed in a "stat" situation.[119]
Amy Goggins renewed restraints and said "I need to renew my restraint order."[120]	Per Policy D-505, a doctor's order is required to be obtained within 24 hours after placing restraints.[121]

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[112] Tr. 293 (Wallace) ("I don't remember reading an exact policy that says you have to have a doctor's order ..."). Wallace contends she violated a non-existent policy.

[113] Tr. 644-45 (Hahus); DX 4 at Policy D-1406 (Insertion, Management, and Removal of Central Venous Catheters).

[114] Tr. 294, 427-30 (Wallace).

[115] Tr. 427-28 (Wallace); Tr. 643-44 (Hahus); DX 4 at Policy D-201 (Steps Common to the Administration of Medication).

[116] Tr. 296 (Wallace).

[117] Tr. 339-40 (Wallace); Tr. 644 (Hahus); DX 4 at Policy D-613 (Blood Specimen Collection).

[118] Tr. 295 (Wallace).

[119] Tr. 643 (Hahus).

[120] Tr. 296-97 (Wallace).

[121] Tr. 645 (Hahus); Tr. 430-33 (Goggins); DX 4 at Policy D-505 (Use of Restraints). Wallace cannot rely on conduct by Goggins because Goggins was both pregnant at the time of trial and pregnant during the last 8 months of Wallace's employment.

WALLACE'S EXAMPLES OF OTHER CONDUCT	RECORD EVIDENCE OF OTHER CONDUCT
Linda Coscio increased dopamine level.[122]	Coscio tripped and disconnected the dopamine line and she increased the level to meet doctor's standing order to maintain certain blood pressure.[123] A doctor's order is not required to increase dopamine level to an ordered level according to Policy D-201.[124]
Writing down a verbal order.	A doctor's order is not needed to transcribe a verbal order per Policy D-203.[125]
I.V. line flushes.[126]	Per Policy D-1406, a doctor's order is not needed for a saline flush.[127] (A doctor's order is required for a heparin flush, but no flush was performed without a doctor's order).
Non-prescription drugs (like Blistex or Chapstick).[128]	A doctor's order is not needed to administer over the counter drugs.[129]
X-rays.[130]	A doctor's order is not needed for an x-ray if x-ray is part of another ordered procedure.[131]

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[122] Tr. 293-94 (Wallace).

[123] Tr. 444-47 (Wallace); Tr. 642 (Hahus); Tr. 993 (Coscio).

[124] Tr. 642 (Hahus); DX 4 at Policy D-201.

[125] Tr. 647 (Hahus); DX 4 at Policy D-203 (Transcribing Physician's Orders).

[126] Tr. 716-17 (Hahus).

[127] Tr. 647-48 (Hahus); DX 4 at Policy D-1406 (Insertion, Management, and Removal of Central Venous Catheters).

[128] Tr. 614 (Hahus).

[129] Tr. 648 (Hahus).

[130] Tr. 269 (Wallace); Tr. 586 (Goggins). Only Wallace and Goggins testified they wrote orders to take x-rays, *both times as part of another doctor-ordered procedure, and were not disciplined or terminated.* Such conduct is acceptable. Tr. 648-9 (Hahus).

[131] Tr. 648-9 (Hahus).

WALLACE'S EXAMPLES OF OTHER CONDUCT	RECORD EVIDENCE OF OTHER CONDUCT
Gaskin testified that Schmitz restocked the "crash cart" and wrote verbal orders to replace the supplies.[132]	A nurse may restock supplies after emergency use without a doctor's order because (1) no policy requires a doctor's order and (2) the particular patient must be charged for the supplies used reflecting the verbal order given by the doctor during the emergency.[133]
"Lab values;" "type and cross lab-draw."[134]	No witness testified about these procedures.[135]
"Maintenance" and "dressing changes."[136]	There is no policy requiring a doctor's order for any type of "maintenance." Per Policy D-1406 "site care [of] dressing" does not require a doctor's order.[137]
"Arterial gas" and "blood culture."[138]	The words "arterial gas" do not appear in the record. Per policy D-613, a doctor's order is not needed to draw blood unless drawn from the leg or foot.[139]

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[132] Tr. 669 (Gaskin).

[133] Tr. 377, 436 (Wallace); Tr. 630-41 (Hahus). Wallace produced no evidence that a written Methodist policy required a doctor's order in this situation. Methodist policy did require a physician's order for the "administration of medications" and for "medications intended for self administration." DX 4, Policy D-201, p. 1. Gaskin did not testify that Schmitz wrote orders to administer medication; she testified that Schmitz wrote orders to restock inventory." R. 1127 n. 20.

[134] This instance was first identified in Wallace's brief to the court of appeals.

[135] In her brief to the court of appeals, Wallace cites only her own attorney's question about Tylenol (Tr. 662) and a witness answer "not that I recall" (Tr. 669 line 25), but no witness testimony about either "lab values" or "type and cross lab-draw."

[136] R. 302 (Rousseau-Mezile).

[137] DX 4 at Policy D-1406 (Insertion, Management, and Removal of central Venous Catheters). No other policy address "dressings" or requires a doctor's order to change dressings.

[138] Tr. 528, 529, 530 (Gray).

[139] Tr. 339-40 (Wallace); Tr. 644 (Hahus); DX 4 at Policy D-613 (Blood Specimen Collection).

WALLACE'S EXAMPLES OF OTHER CONDUCT	RECORD EVIDENCE OF OTHER CONDUCT
FALSIFICATION OF RECORD	
Nurse threw away a damaged unit of blood, but wrote in the patient's record that the blood had been administered.[140]	Hahus discovered a discarded unit of blood, confirmed the blood was not administered and ***terminated the nurse*** per Policy P001.[141]
Wallace wrote an order for a medical procedure that required a doctor's order by policy D-707 and undertook the procedure without receiving an order.	Following a 12 step investigation and admission by Wallace, ***Wallace was terminated*** under Policy P001.
PERFORMING PROCEDURE REQUIRING DOCTOR'S ORDER WITHOUT A DOCTOR'S ORDER	
Wallace removed and inserted a nasogastric tube without consulting with a doctor or receiving a doctor's order.	***Wallace was terminated*** under Policy P001.[142]

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[140] Tr. 607-08 (Hahus).

[141] Tr. 607-08 (Hahus).

[142] DX 22 (termination notice); Tr. 1066 (Hahus).